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IN THE

Supreme Court of the United States

October Term, 1960.

No. 50.

EASTERN RAILROAD PRESIDENTS CONFERENCE, et al.,

Petitioners,

v.

NOERR MOTOR FREIGHT, INC., et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS.

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BRIEF FOR RESPONDENTS.

QUESTIONS PRESENTED.

1. Where the District Court found as a fact that petitioners combined and conspired with the specific intent of eliminating respondent trucking companies as competitors in the long-haul freight business, in order to monopolize that business for themselves, and the Court of Appeals sustained that finding as soundly based on substantial evidence, are petitioners exonerated from liability under the Sherman Act because the means they employed to achieve their illegal objective included, among other activities, a public relations campaign against respondents (in which petitioners' role was concealed and disguised), to procure state governmental restrictions against respondents to put them out of business, in direct conflict with the national transportation policy declared by Congress?

2. Where respondents, other than PMTA, were injured as a result of petitioners' conspiracy to eliminate them as competitors in the long-haul freight business, but agreed by stipulation to limit their claims for actual damages in order to expedite the trial, relying on their association, PMTA, to recover the amounts spent in defense against the conspiracy, a right which petitioners did not question or deny, until after their liability to PMTA for such damages had been determined: (a) were respondent trucking companies properly awarded nominal damages when they proved injury to themselves; (b) was respondent PMTA properly awarded damages representing the amounts spent by it in defense against the conspiracy and (c) were respondents properly granted an injunction against continuation of the conspiracy to eliminate their competition, where the District Court found that petitioners intended to resume their activities, unless enjoined?

STATUTES INVOLVED.

Respondents agree with petitioners' citation of the statutes involved, but deny that any substantial question arises under the First Amendment of the Constitution of the United States.

STATEMENT OF THE CASE.

A. Petitioners' Objective.

Respondents pleaded and the District Court found that (1) petitioners combined and conspired with the specific intent and for the purpose of eliminating respondent trucking companies as competitors of petitioner railroads in the long-distance hauling of freight in interstate commerce, and (2) performed hundreds of overt acts to achieve their goal (R. 5, R. 25-26, ¶ 12, R. 106).[1]

Petitioners' brief ignores the finding of their intent to destroy respondents as competitors and to monopolize the long-haul freight business in northeastern United States for themselves; sloughs over the many acts other than the dissemination of literature on truck road damage for the purpose of procuring truck weight and tax legislation; and implies that their propaganda was published merely anonymously, whereas actually it was affirmatively misrepresented as coming from other sources like the Grange, associations of public officials, citizens' groups and "front" organizations created or activated by petitioners.

These fundamental findings of the District Court, affirmed by the Court of Appeals, along with the other findings of fact, as "soundly based on substantial evidence" (R. 216)[2] were not directly challenged by petitioners in the Court of Appeals, nor do they directly challenge them here. At the very most they state obliquely that "there is

1. References to "¶" are to Findings of Fact made by the District Court, pursuant to Respondents' requests. The District Court's rulings on these requests appear at R. 157. Extensive narrative findings of fact are set forth in the District Court's opinion (R. 41-101).

2. Under the practice of the third circuit the opinions of the court are circulated among all seven members of the court, including those not on the panel hearing the case. Rehearing is ordered when a majority of the court so votes. *United States v. United Steelworkers of America*, 271 F. 2d 676, 694 (3d Cir. 1959). It would appear from the Per Curiam opinion (Chief Judge Biggs dissenting) that all the judges except Judge Biggs concurred in the order and did not favor rehearing here.

dispute between the parties as to the purposes which motivated this campaign" (Petitioners' Brief, p. 12). This, of course, is not the same as asserting that the District Court's findings as to petitioners' purpose and intent are not supported by the evidence, and nowhere do petitioners make such assertion. And whatever dispute may have existed has now been resolved in favor of respondents' contention by the District Court.

The finding is supported by the direct admission of Girdler, the agent in charge of petitioners' campaign (R. 177-178), and counsel for petitioners admitted in the District Court that fundamentally the facts claimed by appellees were not controverted (R. 61b).

Girdler testified that petitioners' objective was to confine trucking companies, such as respondents, to short-haul business, leaving long-haul freight exclusively to petitioners (R. 169, R. 177-178). The distinction he made between long-haul and short-haul is significant. When petitioners think it profitable for themselves to carry the particular freight the distance in question, it is long-haul, but if the railroads do not want to handle it, then it is short-haul (R. 176). In a written memorandum of petitioners' objectives Girdler stated that limitation of trucks to short hauls, leaving long-hauls to the railroads, was the national transportation policy declared by Congress (Pl. Ex. 24, R. 162b, R. 177-178). This, of course, is a complete distortion of the Congressional policy, for, as this Court recently had occasion to point out, it is the national transportation policy to safeguard over-the-road trucking from invasion or domination, and, a fortiori, therefore, from elimination, by the railroads. See *American Trucking Associations v. United States*, 364 U. S. 1. Girdler's memorandum was approved by petitioners' key executives, including the president of the Pennsylvania Railroad, who supplemented it with suggestions of his own for materially reducing trucking company earnings (Pl. Ex. 26, R. 189-190, R. 172-173).

Respondents, long-haul truckers, were the direct target of petitioners' campaign (R. 181). Constituting about five

per cent. of the trucking industry, they were labelled by petitioners as "five percenters". The label was really intended, however, "to capitalize on the nefarious meaning given that term as a result of the (then) recent Senate investigation", which did not involve respondents at all (Pl. Ex. 29, R. 173b). Petitioners' plan was to "isolate" respondents, to split them from the rest of the industry (R. 178-179). The plan was "largely negative aimed directly at the trucks" (Def. Ex. 28, R. 213) and was intended "to make long-haul trucking more expensive", and this at a time when there was a serious freight car shortage, as a result of which the railroads were not even in a position to handle any greater volume of business (Pl. Ex. 207, R. 207, Pl. Ex. 261, R. 208). As one of petitioners' own committee members said, it was "like duPont saying we can't make all of the nylon that is needed but protesting anyone else making it" (Def. Ex. 28, R. 213).

Petitioners concede that they sought their objective in combination.

B. The Means Employed by Petitioners to Achieve Their Objective.

Petitioners in achieving their objective of eliminating long-haul truck competition, attacked and vilified the long-haul truckers through a barrage of propaganda issued by Byoir in the names of organizations of farmers, township officials, motorists and so forth, in order to disguise and conceal their own role, and the fact that they were preparing, paying for and disseminating the material themselves[3] (¶ 19-26, R. 27-28).

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3. The "third party" public relations technique was effectively used by Byoir in a prior campaign, in which Byoir was convicted of violating the anti-trust laws. *United States v. New York Great Atlantic & Pacific Tea Co., Inc.*, 67 F. Supp. 626, 673-74 (1946), aff'd 173 F. 2d 79, 89-90 (7th Cir. 1949). It had also been used by the railroads in the 1930's to restrain interstate trucking, as found by the Wheeler Committee of the United States Senate (¶¶ 17, 18, R. 26 to 27).

For example, Byoir "formed the Empire State Transport League in New York because we needed an organization that could legitimately mail all types of propaganda on the general subject of trucks and highways", suggesting at the same time that the railroads should "put the arm" on their suppliers and other industries to get them to go along with the purposes of the conspiracy (Pl. Ex. 35, R. 198). The Transport League was ostensibly an organization of highway users. Volume II of the Record graphically demonstrates how such material, all prepared and paid for by petitioners, was issued in the names of such organizations as the Empire State Transport League (R. 383b-385b, 441b, 522b-524b); the New Jersey Automobile Owners, Inc. (R. 393b-440b, R. 444b-472b, 550b-553b, R. 556b); the New Jersey Citizens Tax Study Foundation (R. 442b-443b, R. 473b-477b); the Citizens Highway Committee (R. 442b-443b, R. 473b-477b); the Citizens Tax League (R. 386b-391b); the Pennsylvania State Grange (R. 485b-486b, 514b-515b, R. 531b-535b); the Bureau of Public Roads of the State of Ohio (R. 507b-509b); and the Pennsylvania State Association of Township Supervisors (R. 510b-513b, R. 530b, R. 549b).

In all of this material the railroad connection was concealed. The Byoir plan, described euphemistically by it, was "not (to) have a client for attribution", and to create not only the publicity, but also "the groups and occasions" for its dissemination (Pl. Ex. 24, R. 168b). The railroads were to be kept out of it, and this was done by such means as Byoir's false representations that its employees were working not for the railroads, but for other organizations, such as the Grange (Pl. Ex. 109, R. 200-201, R. 45, R. 32-33). In some instances this technique was illegal under state law (¶ 47, R. 33, R. 77), and the Federal Communications Act (R. 136-137).

Byoir described its own anti-truck material as "poison" to be perpetrated "upon the defenseless public" (Pl. Ex. 148, R. 202). They boasted of their "ace ghost-

writer" who developed a story entitled "History, Trucks and Money" which appeared over somebody else's by-line, without any disclosure as to its source, in the National Grange Monthly. It was sent by a vice-president of the Pennsylvania Railroad to Milton Eisenhower, then president of Pennsylvania State College, as though the railroads had had nothing to do with it (Pl. Ex. 174, Pl. Ex. 178, R. 202-204, ¶ 33, R. 29-30). Similarly, Byoir used Mrs. Bessie Q. Mott, Chairman of the Public Affairs Department of the New York State Federation of Women's Clubs, to issue anti-truck pamphlets in her name and to organize forums, without disclosing the fact that she was on retainer by the railroads, and that her performance would determine whether she would continue to be used and paid "when the fight would get hot" (Pl. Ex. 16G, R. 379b, Pl. Ex. 12, R. 537b-543b, Pl. Ex. 11, R. 186).

Petitioners were responsible for the preparation and dissemination of national magazine articles and other syndicated material which appeared over the names of apparently disinterested professional authors attacking long-haul truckers under such titles as "The Giants That Wreck Our Highways" (Pl. Ex. 49, R. 548b-549b); "The Rape of Our Roads" (R. 562b-563b); and "Trucks Wreck Your Roads" (R. 575b-578b), or which depicted horrible highway accidents involving heavy trucks (R. 561b), the theme throughout being that heavy trucks are solely responsible for damaging and destroying the highways, and for the sensationally depicted highway accidents. The railroad source of all of this material was concealed (¶ 19, 25, 28, 29, R. 28-29).

Petitioners financed and caused to be published in the names of third parties, ostensibly independent surveys, polls and reports, which were neither independent nor impartially compiled, and which repeated the anti-truck line. Petitioners' role was again concealed (¶ 27, R. 28).

They labelled respondents not only as "five" percenters", which connoted "fixers", but also as "evil,

sinister wrongdoers" and villains (Pl. Ex. 29, R. 173b, Pl. Ex. 23, R. 187).

Byoir agents and others worked behind the scenes with public officials and legislators to influence their reports and other official actions adversely to respondents, without disclosing the railroad connection (¶ 34, R. 30, R. 83).

None of these facts, all the subject of findings by the District Court, and all designed to achieve petitioners' illegal objective is challenged by petitioners. As stated by Byoir: "In the campaign to follow, every action, from the major statement by the most important witness before a legislative committee on down to the briefest leaflet distributed in Hohokus, must be consistent with that platform" (Pl. Ex. 5, R. 141b).

C. The Impact of the Conspiracy on Respondents.

The unlawful object of petitioners' combination and conspiracy—elimination of long-haul truck competition—was plainly calculated to injure respondents. The injury was not exclusively legislative. The attacks on respondents were primarily directed to the public at large, including respondents' shippers and customers. The immediate aim was to foment resentment and hostility. As the District Court found, the truckers, without justification "were categorized as law-breakers, road-hoggers, completely indifferent to the safety of others on the highway and moochers on the public through failure to pay their way" (R. 105). The campaign was also intended to and did result, according to petitioners' own claims, in legislative and executive action which adversely affected respondents, by imposing on them burdensome restrictions as to size and weight limitations and ton-mile taxes (Pl. Ex. 53, R. 80-82). The District Court found that petitioners succeeded in procuring weight restrictions in New Jersey and retaining weight restrictions in Pennsylvania, and in procuring a ton-mile tax in New York, which they were also seeking to procure in New Jersey, Ohio,

Indiana and Pennsylvania (¶ 40 and 41, R. 32). The weight restriction thus maintained in Pennsylvania as a result of petitioners' activities, left in effect an "interstate trade barrier", since the Pennsylvania limit was 45,000 pounds in contrast to 60,000 pounds in all surrounding states, except West Virginia, where it was 58,400 pounds (¶ 42, R. 32).

A stipulation was entered into solely in order to expedite commencement of the trial, whereby the individual trucking companies limited their money damage claims to the injury resulting from the Pennsylvania veto. For other damages, they relied on the claim of their association, PMTA, to recover for its expenditures in defending against the conspiracy. Petitioners never questioned PMTA's standing to recover such damages until after the trial, when their liability to PMTA had been determined. If that issue had been timely raised by petitioners, the other respondents would never have stipulated away their own damage claims, other than those arising from the veto, and would clearly have been entitled to recover, at the very least, the amounts paid by them to their association to enable it to conduct the defense. As it is, they were awarded nominal damages, because of the fact that they were actually injured by the conspiracy. Indeed a memorandum prepared by petitioners was put in evidence at the trial showing that petitioners had actually calculated in advance the loss which would be sustained by several of the individual respondent trucking companies as a result of one phase of petitioners' conspiracy (Pl. Ex. 169).

SUMMARY OF ARGUMENT.

I.

The District Court found that petitioners combined and conspired for the purpose and with the specific intent of eliminating respondents as competitors in the long-distance hauling of freight in interstate commerce, carrying out hundreds of overt acts to achieve their goal. Petitioners do not challenge this basic finding of fact, and the Court of Appeals held that it, together with all the other findings was "soundly based on substantial evidence". Such a combination and conspiracy clearly violates the Sherman Act. The fact that one of the means of achieving that unlawful end included the fomenting of legislative restrictions and burdens on respondents, by acting through "front" organizations and concealing petitioners' role, does not exonerate petitioners from liability. This Court so held in *United States v. Sisal Sales Corp.*, 274 U. S. 268, and this principle has been sustained by the overwhelming weight of authority in the Courts of Appeal and District Courts.

Petitioners falsely represented that their unlawful objective coincided with and was carrying out the national transportation policy declared by Congress, whereas, as this Court has pointed out, that policy militates against invasion and domination of the over-the-road trucking field by the railroads, and a fortiori, therefore, against elimination of such competition. See *American Trucking Associations, Inc. v. United States*, 364 U. S. 1. It would be anomalous if such conduct by petitioners were to be deemed privileged, when specifically intended to achieve interstate restraints contrary to federal policy.

The fact that petitioners employed public relations techniques to achieve their objective, carries no privilege. To outlaw conspiracies in restraint of trade has never been deemed an abridgement of freedom of speech or press,

merely because they are carried out by means of spoken or written matter. *Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490, 502. Petitioners' technique of attacking respondents under the false guise of organizations of farmers, motorists, township officials and even official state bureaus was not merely a campaign of anonymous publicity, but constituted active fraud and deception, and so, quite apart from the unlawful purpose, is illegal. *Hazel Atlas Glass Co. v. Hartford Empire Co.*, 322 U. S. 238; *Marshall v. The B. & O. Railroad Co.*, 16 Howard (57 U. S.) 314.

The injunction is narrowly framed so as to prohibit only acts done pursuant to the unlawful conspiracy, leaving petitioners free to act individually or for other purposes. The acts enjoined consist principally of concealment of petitioners' part in disseminating material defaming respondents. The injunction specifically states it does not apply to efforts by petitioners to obtain legislative benefits for themselves. An injunction against a conspiracy of this nature is not unconstitutional just because it prohibits conduct made effective by spoken or written matter. *Giboney v. Empire Storage & Ice Co., supra; Chamber of Commerce v. F. T. C.*, 13 F. 2d 673, 686, 696-697 (8th Cir. 1926). The requirement of disclosure is also well established as an appropriate remedy for evils found to be violative of federal policy. *United States v. Harriss*, 347 U. S. 612; *Bantam Books v. F. T. C.*, 275 F. 2d 680 (2d Cir. 1960). No case, not even those like *Talley v. California*, 362 U. S. 60, which permit certain oppressed minority groups who might otherwise be intimidated in their exercise of free speech (certainly not the nation's most powerful railroads), to publicize their legitimate grievances anonymously, protects as free speech the publication, through "front" organizations, with deliberate misrepresentation of its source, of defamatory material pursuant to a conspiracy whose object is to restrain and monopolize interstate commerce.

II.

Respondent trucking companies, as found by the District Court, were injured as a result of petitioners' combination and conspiracy to eliminate them as competitors. To expedite the commencement of the trial, they stipulated that they would not seek to recover actual damages, except for those flowing from the Governor's veto of the Pennsylvania increased weight limit bill, held by the courts below not to be recoverable. These respondents relied on their association, PMTA, to recover damages resulting from amounts spent in defense against the conspiracy. Petitioners never pleaded the defense that PMTA had no standing to recover such damages, thus waiving that defense under F. R. C. P. 12(h). Nor did they even raise the issue until after their liability to PMTA had been determined following a lengthy trial. If the defense had been timely raised, the other respondents would never have stipulated away their own losses sustained as a result of their expenditures in defense against the conspiracy, so that it would be manifestly unfair to permit PMTA's recovery to be challenged now. PMTA's damages were limited to its expenditures made in direct defense against the conspiracy, and it was injured in its own property within the meaning of the Clayton Act.

Injunctive relief is justified, in view of the finding that petitioners intended to resume their activities, for the same unlawful purpose, unless enjoined.

ARGUMENT.

I. Petitioners' Combination and Conspiracy to Eliminate Respondents as Competitors in the Interstate Hauling of Freight Clearly Violates the Sherman Act.

The finding of the District Court that petitioners combined and conspired with the intent and purpose of eliminating respondent trucking companies as competitors in the long-distance hauling of freight in interstate commerce, affirmed by the Court of Appeals, stands unassailed. All of petitioners' activities were found to have been carried out for that purpose. Such a combination is clearly in violation of the Sherman Act, which "forbids combinations of traders to suppress competition", *United States v. Parke, Davis and Company*, 362 U. S. 29. This is true regardless of whether the means would be legal or privileged in the absence of the illegal purpose. *American Tobacco Company v. United States*, 328 U. S. 781, 789.

Nowhere in their brief do petitioners squarely face this issue, and their entire argument is predicated upon their ignoring this incontrovertible finding as to their unlawful purpose. The closest they come to discussing it is the assertion that "*if* the nature of the activity involved is such that it does not restrain or monopolize trade within the meaning of the statute, and has no inherent tendency to do so, then it is not unlawful even if prompted by an intent to injure competitors" (Petitioners' Brief, p. 23). A combination of the nation's most powerful railroads to destroy truck competition has such an "inherent tendency." In *Standard Oil Co. v. United States*, 221 U. S. 1, 76, it was deemed significant that the methods used by the defendants "necessarily involved the intent to drive others from the field and to exclude them from their right to trade, and thus accomplish the mastery which was the end in view." And commenting on *Standard Oil*, in *United States v. American Tobacco Co.*, 221 U. S. 106, 179, the Court said:

> "Applying the rule of reason to the construction of the statute, it was held in the *Standard Oil* case that, as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the anti-trust act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition, or unduly obstructing the due course of trade or which, either because of their inherent nature or effect, or *because of the evident purpose of the acts*, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance."

This was cited with approval in *Klor's v. Broadway-Hale Stores*, 359 U. S. 207, 211.

The fact that petitioners did not succeed in their objective of completely eliminating respondents' competition is immaterial in the light of the finding of their specific intent to restrain trade and to monopolize, since the dangerous probability of success is presumed to be consequent upon such specific intent. *Swift and Co. v. United States*, 196 U. S. 375, 396; *United States v. Columbia Steel Co.*, 334 U. S. 495, 525. On this campaign alone petitioners spent over two and a quarter million dollars (¶ 15, R. 26). With their assets of $15,000,000,000 and annual operating revenues in excess of $4,000,000,000 (¶ 9, R. 25), they had the power to inflict much greater injury, if permitted to continue.

Petitioners acknowledge in their petition for certiorari that "the statute is sufficiently flexible and adaptable to be extended to new practices that properly fall within its scope. . . ." Cf. *Standard Oil Co. v. United States*, 221 U. S. 1, 59-60 (1911); *Klor's v. Broadway-Hale Stores*, 359 U. S. 207, 211. No extension is necessary to apply it in the circumstances of this case. The case of *Apex Hosiery Co. v. Leader*, 310 U. S. 469, a labor union dispute, is not in point, since that did not involve a combination to eliminate

competition. If the activities in that case had been undertaken by a combination of competitors, there would have been a violation of the Sherman Act.

II. Petitioners Are Not Exonerated From Liability Under the Sherman Act Because the Means Employed to Achieve Their Illegal Objective Included Among Other Activities Efforts to Procure State Legislative and Executive Action.

Falsely representing that they were carrying out the national transportation policy declared by Congress,[4] in seeking to limit trucks to short hauls and to monopolize long-haul freight for themselves, petitioners, as part of their campaign, procured and sought to procure, the imposition of state governmental restrictions and burdens on respondents in the form of size and weight limitations, and ton-mile taxes (¶ 40 and 41, R. 32).[5] Their campaign was based on fraud and misrepresentation, since the unimpeached findings of the District Court show that petitioners masqueraded as the Pennsylvania Grange, as the Pennsylvania Association of Township Supervisors (which by statute was forbidden to engage in such activities) (¶ 47, R. 33), as motorists associations, and so forth. They worked behind the scenes with government officials, succeeding even in getting their statistics, loaded against the trucking industry, before the Governor of Pennsylvania and his

4. The national transportation policy, as actually declared by Congress, and interpreted by this Court militates against invasion of the motor-carrier field by the railroads and weakening "the safeguards which have been painstakingly erected to prevent railroad domination of trucking." *American Trucking Associations, Inc. v. United States*, 364 U. S. 1.

5. The District Court found that it was "the purpose and intent" of petitioners "to hurt the truckers in every way possible *even though they secured no legislation;* it was their purpose to restrict the activities of the truckers in the long-haul industry to the greatest extent possible, and finally, if possible, to drive them out of that segment of the entire transportation industry" (R. 88). That aim is nowhere disavowed in petitioners' brief.

Secretary of Highways, in the guise of a report of the assistant chief engineer of the Department of Highways (R. 83).

Even in the absence of a prohibited Sherman Act combination, this Court has sustained a cause of action for damages resulting from legislation procured by one person, through misrepresentation, to the injury of another. *Angle v. Chicago, St. Paul, Minneapolis & Omaha Railway Company*, 151 U. S. 1. Where a combination and conspiracy in violation of the Sherman Act are involved, liability is clear even though procuring legislation is one of the means used. *United States v. Sisal Sales Corporation*, 274 U. S. 268, 276. That decision, and *Steele v. Bulova Watch Co.*, 344 U. S. 280, as pointed out by the Court of Appeals here, limit *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, to holding that the Sherman Act cannot be invoked against persuading a foreign sovereign to act within its own jurisdiction, where there is no effect within the United States. By contrast, as stated in *Sisal*, expressly rejecting any broader holding for the *Banana Co.* case: "True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States. They are within the jurisdiction of our courts and may be punished for offenses against our laws." 274 U. S. at p. 276.

It would indeed be anomalous if the actual national transportation policy declared by Congress, as against what petitioners falsely said it was, could be frustrated by a series of state restrictions, procured by the railroads to burden the trucking industry, which taken individually, might be within the valid police or taxing powers of the individual states, but in sum total were calculated by the railroads to cripple interstate trucking.[6] Here petitioners

6. Even a state cannot bar interstate motor carriers from use of state roads as punishment for repeated violations of state highway regulations. *Castle v. Hayes Freight Lines, Inc.*, 348 U. S. 61. Nor may a state restrict interstate transportation by legislation whose "primary purpose is not regulation with a view to safety or to con-

procured weight restrictions on respondents in New Jersey and Pennsylvania and a ton-mile tax in New York, and were extending their operations in other northeastern states (¶ 40 and 41, R. 32). It is significant that petitioners' campaign against interstate trucking was not directed to the Congress of the United States, but to state legislatures and officials, which actually have no concern with enacting the national transportation policy.

Consistent with the holding of the *Sisal* case, *supra*, it has repeatedly been held that combinations in restraint of trade or to monopolize, similar to the conspiracy here, are not exempted from the scope of the antitrust laws merely because some or all of the means used by the conspirators involve contacts with legislative, judicial or other governmental agencies which would otherwise be privileged or even constitutionally protected in the absence of the illegal purpose. *Atchison, Topeka & Santa Fe Rwy. v. Aircoach Transport Ass'n*, 253 F. 2d 877 (Ct. of App. D. C. 1958); *Riss & Co., Inc. v. Association of Western Rwys.*, 159 F. Supp. 288 (D. D. C. 1958); *United States v. Association of American Railroads*, 4 F. R. D. 510 (D. Neb. 1945); *Parmelee Transportation Company v. Keeshin*, 144 F. Supp. 480, 484 (N. D. Ill., 1956). See also *Slick Airways, Inc. v. American Air Lines*, 107 F. Supp. 199 (D. N. J. 1951), appeal dismissed, 204 F. 2d 230 (3d Cir. 1953), cert. denied, 346 U. S. 806; *United States v. Krasnov*, 143 F. Supp. 184 (E. D. Pa. 1956), aff'd 355 U. S. 5; *Forgett v. Scharf*, 181 F. 2d 754 (3d Cir. 1950); *Kobe, Inc. v. Dempsey Pump Co.*, 198 F. 2d 416, 424-5 (10th Cir. 1952).

Okefenokee Rural Electric Membership Corp. v. Florida Power & Light Co., 214 F. 2d 413 (5th Cir. 1954), relied on by petitioners, has clearly been limited by the subsequent decisions in *Crummer v. DuPont*, 223 F. 2d 238 (5th Cir.

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servation of the highways but the prohibition of competition". *Buck v. Kuykendall*, 267 U. S. 307. Cf. *Atchison, Topeka & Santa Fe Rwy. Co. v. City of Chicago*, 240 F. 2d 930, 940 (7th Cir. 1957), aff'd 357 U. S. 77.

1955) and 255 F. 2d 425 (5th Cir. 1958), cert. denied 358 U. S. 884, as the Court of Appeals here recognized. *Olsen v. Smith*, 195 U. S. 332; *Parker v. Brown*, 317 U. S. 341 and *United States v. Rock Royal Co-Op.*, 307 U. S. 533, also relied on by petitioners, are not in point, since they involve efforts to invalidate *governmental* action on the basis of the Sherman Act, not to hold private conspirators responsible for their own conduct. As pointed out in *Parker v. Brown* ". . . a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." 317 U. S. at p. 351. Cf. *United States v. Frankfort Distilleries, Inc.*, 324 U. S. 293, 298; *United States v. Silliman*, 167 F. 2d 607, 612 (3d Cir. 1948), cert. denied, 335 U. S. 825.

Accordingly, simply because petitioners included in their campaign, efforts to impose state governmental restrictions and burdens on respondents, there is no reason to depart from the established principles of anti-trust law, supported by the overwhelming weight of authority, that a conspiracy to eliminate a competitor is a violation of the Sherman Act.

III. Application of the Sherman Act to Petitioners' Activities Does Not Violate Their Right of Free Speech.

In passing the Sherman Act, Congress "left no area of its Constitutional power unoccupied; it 'exercised all the power it possessed'." *United States v. Frankfort Distilleries, Inc.*, 324 U. S. 293. In *Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490, 502, with respect to enforcement of a state anti-trust law, this Court stated: ". . . it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed. . . . Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade

as well as many other agreements and conspiracies deemed injurious to society." This is a sweeping statement, in nowise limited to the area of picketing as petitioners contend. It applies with even greater force where the plenary power of Congress under the commerce clause is involved, and not simply the power of a state to prohibit a local restraint. See also *Associated Press v. United States*, 326 U. S. 1.

If a public relations campaign were per se privileged, the railroads, with their tremendous financial resources, could simply purchase a concerted attack on their competitors, without any risk of incurring the penalties of the anti-trust laws, being subject solely to the laws of defamation and unfair competition.[7] Such a result would clearly frustrate the language and purpose of the Sherman Act. As this Court recognized in *American Tobacco Co. v. United States*, 328 U. S. 781, 797, with respect to the closely related field of advertising: "Such tremendous advertising . . . is also a widely published warning that these companies possess and know how to use a powerful offensive and defensive weapon against competition."

Petitioners were held liable not for mere advocacy of abstract beliefs, but for engaging in specific action to accomplish their unlawful purpose, which the District Court found to include hundreds of overt acts (R. 106).

In view of petitioners' unlawful purpose, *Talley v. California*, 362 U. S. 60, is not in point. In *Talley* the Court invalidated a Los Angeles ordinance which prohibited distribution of anonymous handbills under all circumstances.

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7. In view of petitioners' unlawful purpose and intent, the claimed truth of a portion of their anti-truck material (as distinguished from its misrepresented source, which is admittedly false and cannot possibly be proved true), is not a defense, as it might be in an ordinary libel suit. Cf. *Fashion Originators' Guild v. F. T. C.*, 312 U. S. 457. Moreover, the material was not true. It was all presented under false colors, and included distortions of the truth. (See, e.g. ¶ 35, 36 and 37, R. 30-31, R. 105), and defamatory material, the truth of which petitioners made no attempt to prove (¶ 31, 32, R. 29).

There was no attempt to show that the particular handbill involved was distributed for an unlawful purpose, or to show that the ordinance itself was aimed at curbing any unlawful conduct.

Apart from the question of purpose, however, *Talley* does not hold that all anonymous publicity is constitutionally protected. In *Riss & Co., Inc. v. Association of American Railroads*, 1960 CCH Trade Cases ¶ 69,736 (D. D. C. 1960), a case similar in scope to this one, involving a number of the same defendants and the same sort of campaign, Judge Sirica held: "In Talley and Little Rock, the basis for the Supreme Court's ruling was that established fears of reprisal and intimidation might deter minority groups from peaceful discussion on matters of public interest. Such is not the situation here. The railroad defendants are among the largest corporations in the country. It certainly cannot be contended that the railroads of the nation will be in danger of intimidation or reprisal if their identities in connection with publicity are revealed. Plaintiff's evidence could justify a jury in finding that defendants employed hostile publicity against plaintiff by means of the 'third-party technique'. For the reasons mentioned, this Court finds that *Talley* is not controlling here."

Furthermore the facts found here make this case completely different from *Talley*: Here petitioners did not act merely under the cloak of anonymity. Here they engaged in active deception and fraud, *misrepresenting* themselves as the Grange, the Township Supervisors, automobile clubs, even the Bureau of Public Roads of the State of Ohio. When challenged petitioner Byoir's employees were instructed to say they were working, not for the railroads, but for the Grange (Pl. Ex. 109, R. 200-201, ¶ 45, R. 32-33). In the course of their campaign they violated state law (¶ 47, R. 33, R. 77), and the Federal Communications Act (R. 136-137). Their dissemination under such false colors, of misrepresented polls, surveys, studies and anti-truck publicity, which they prepared and paid for, without disclosure of

their role, in pursuance of an unlawful end has no redeeming social purpose, and is analogous, not to what was done in *Talley*, but to the practice condemned by this Court in *Hazel Atlas Glass Co. v. Hartford Empire Co.*, 322 U. S. 238, which set aside a patent on the ground that Hartford, in support of its application, filed an article ostensibly written by the president of the American Flint Glass Workers Union, whereas in fact it was prepared by Hartford. The Court said: "Truth needs no disguise. The article, even if true, should have stood or fallen under the only title it could honestly have been given—that of a brief in behalf of Hartford, prepared by Hartford's agents, attorneys and collaborators." 322 U. S. at pp. 246 to 247.

The use of such deceptive practices in a commercial context, was in part the basis of a finding by Judge Wyzanski that there was a violation of the Sherman Act in *Union Leader Corp. v. Newspapers of New England, Inc.*, 180 F. Supp. 125 (D. Mass. 1959). He held that Section 2 of the Sherman Act "prohibits a person (a) who has an intent to exclude competition (b) from using not merely technical restraints of trade, but even predatory practices, unfair methods of competition, or business patterns not honestly industrial—in short what may loosely be called unfair means". 180 F. Supp. at p. 140. He went on to find that payment to eight individuals for "solicitation of outsiders to advertise in the Journal without disclosing to those outsiders that the eight were not disinterested fellow advertisers as they purported to be, but were paid employees of the Journal, was an unfair practice not honestly industrial." 180 F. Supp. at p. 141.[8]

Far from being privileged, petitioners' technique to procure legislation by misrepresentation of their true con-

8. In *Martell v. White*, 185 Mass. 255, 260, 69 N. E. 1085, 1087, 1088 (1904), the Court said: "The trader has not a free lance. He may fight, but as a soldier, not as a guerilla . . . No man can justify an interference with another man's business through fraud or misrepresentation nor by intimidation, obstruction, or molestation." See *Prosser on Torts*, pp. 1020-1029 (1941).

nection, has been held to be against public policy and illegal. Indeed, one of the principal defendants in this case, the Baltimore & Ohio Railroad, successfully contended in this Court that its own contract with a lobbyist to secure legislation without disclosing the railroad's connection with the lobbyist, was void and unenforceable because of its illegality. *Marshall v. The B. & O. Railroad Co.*, 16 Howard (57 U. S.) 314. This Court held, at page 335:

> "All persons whose interests may in any way be affected by any public or private act of the Legislature, have an undoubted right to urge their claims and arguments, either in person or by counsel professing to act for them, before legislative committees, as well as in courts of justice. But where persons act as counsel or agents, or in any representative capacity, it is due to those before whom they plead or solicit, that they should honestly appear in their true characters, so that their arguments and representations, open and candidly made, may receive their just weight and consideration. A hired advocate or agent, assuming to act in a different character, is practicing deceit on the Legislature. Advice or information flowing from the unbiased judgment of disinterested persons, will naturally be received with more confidence and less scrupulously examined than where the recommendations are known to be the result of pecuniary interest, or the arguments prompted and pressed by hope of a large contingent reward, and the agent 'stimulated to active partisanship by the strong lure of high profit.' Any attempts to deceive persons intrusted with the high functions of legislation, *by secret combinations*, or to create or bring into operation undue influences of any kind, have all the injurious effects of a direct fraud on the public.
>
> "Legislators should act with a single eye to the true interest of the whole people, and courts of justice

can give no countenance to the use of means which may subject them to be misled by the pertinacious importunity and indirect influences of interested and unscrupulous agents or solicitors.

"*Influences secretly urged under false and covert pretenses* must necessarily operate deleteriously on legislative action, whether it be employed to obtain the passage of private or public acts."

See also *Commissioner of Internal Revenue v. Textile Mills Securities Corp.*, 117 F. 2d 62 (3d Cir. 1940), aff'd 314 U. S. 326.

Moreover, petitioners' legislative technique was unlawful under the common law of Pennsylvania, whose legislature and governor petitioners improperly influenced by the conduct they claim is privileged. *Clippinger v. Hepbaugh*, 5 Watts & Sargent 315 (1843).[9]

Consequently, because of their unlawful purpose, carried out by unfair and deceptive means, petitioners cannot escape liability for their acts under the guise of free speech.

The injunction itself is narrow in scope. It is expressly limited to enjoining acts done pursuant to the combination or conspiracy, with the specific intent of restraining competition with respondents (R. 164-165). The activities enjoined fall into two general classes—concealment of petitioners' role in the publication of material relating to respondents and disparagement or defamation of respondents. Injunctions against restraints of trade have been upheld, even though such restraints are made effective in whole or in

9. The right to petition to the Pennsylvania legislature is personal and cannot be delegated. *Spayd v. Ringing Rock Lodge*, 270 Pa. 67 (1921). It is limited to citizens of the Commonwealth. Constitution of Pennsylvania, Article I, Sec. 20. A number of the corporate defendants, as well as the Eastern Railroad Presidents Conference, which organized the conspiracy, are not citizens of Pennsylvania and claimed they were not even within the jurisdiction of the court in Pennsylvania.

part, by acts, words, or printed matter. *Giboney v. Empire Storage & Ice Co., supra; Chamber of Commerce v. F. T. C.*, 13 F. 2d 673, 686, 696-697 (8th Cir. 1926). The principle of disclosure is also well established as an appropriate remedy for evils found to be violative of a Congressional policy —here a conspiracy in violation of the Sherman Act. See, e.g., *United States v. Harriss*, 347 U. S. 612; *Bantam Books v. F. T. C.*, 275 F. 2d 680 (2d Cir. 1960); *S. E. C. v. Morgan, Lewis & Bockius*, 113 F. Supp. 85 (E. D. Pa. 1953), aff'd 209 F. 2d 44 (3d Cir. 1953).

The injunction is expressly limited so as not to prohibit petitioners from seeking legislative, administrative or other governmental benefits for themselves (R. 166).

IV. Respondents Showed the Injury Necessary to Support the Judgment for Damages and Injunctive Relief.

The issue of liability was tried first. In order to expedite commencement of that trial, and to cut short what would otherwise have been interminable discovery proceedings, respondents, other than PMTA, stipulated that their money damage claims would be limited to losses flowing from the Pennsylvania veto, which the courts below held not to be recoverable. Accordingly, as to the individual respondents, there was a finding of injury, but no substantial money damages. In such circumstances it is proper to award nominal damages. See *Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.*, 166 Fed. 254, 260 (2d Cir. 1908); *United Exhibitors v. Twentieth Century-Fox Film Distributing Corp.*, 31 F. Supp. 316, 317 (W. D. Pa. 1940); *Bowman v. West Disinfecting Co.*, 25 F. R. D. 280, 281 (E. D. N. Y. 1960). As said in *Commonwealth v. Musser Forests, Inc.*, 394 Pa. 205, 217 (1958): "Where a plaintiff has stated a good cause of action he is at least entitled to nominal damages . . ."

The right of PMTA, respondents' association, to recover damages was not questioned by petitioners until after it had been determined at the trial on the issue of liability

that PMTA had been injured in its property by the conspiracy, in being compelled to make substantial expenditures for defensive measures. As a trade association PMTA had standing to protect the interests of itself and its members. That is its business. *N. A. A. C. P. v. Alabama*, 357 U. S. 449, 459-60; *McArthur Liquors, Inc. v. Palisades Citizens Ass'n, Inc.*, 265 F. 2d 372, 374 (Ct. of App. D. C. 1959); *Archbold v. McLaughlin*, 181 F. Supp. 175, 180-181 (Dist. D. C. 1960). Cf. *American Trucking Associations v. United States, supra*. And an association may recover damages under the anti-trust laws for injuries done it. *American Cooperative Serum Association v. Anchor Serum Co.*, 153 F. 2d 907, 912-913 (7th Cir. 1946), cert. denied, 329 U. S. 721.

The defense that PMTA had no standing, as a trade association, to recover damages under the anti-trust laws, was not pleaded by petitioners, and accordingly was waived under Rule 12(h) of the federal rules of civil procedure. Cf. *McCandless v. Furland*, 293 U. S. 67. It was not even made the subject of any requested finding by petitioners on the subject of injury.[10] Indeed, petitioners were actively pressing throughout the trial their own similar counterclaim on behalf of the ERPC, an unincorporated association of railroad presidents (R. 51b-1).

If petitioners had properly pleaded this defense, respondents would not have stipulated away all other damages, so that it would be manifestly unfair to permit petitioners now to take advantage of a defense, never pleaded or raised at the trial, and mentioned only in passing in two sentences of a brief devoted to the merits of specific expenditures as items of damage, filed *after* their liability to PMTA for the injury they inflicted had been determined.[11] The other re-

10. Petitioners only request for a finding of fact on the subject of injury was that: "The veto of SB 615 by Governor Fine represented the sovereign act of the Commonwealth of Pennsylvania, and caused no injury to the plaintiffs" (R. 283b).

11. Petitioners' brief in the District Court, filed for the first time *after* they had been held liable to PMTA, and directed solely to the

spondents would clearly have been entitled to recover the amounts spent by them, some in the form of special payments to PMTA, for defense against the conspiracy, all of which was fully disclosed in pre-trial discovery.

As the District Court said: "In accordance with the pre-trial agreement that evidence of actual damage would be heard at a later date in the event that plaintiffs sustained their cause of action, plaintiffs limited their proofs to evidence of general injury flowing from defendants' conduct without attempting to introduce evidence of the actual damage to each individual plaintiff. If it were not for the stipulation of counsel referred to, *supra*, the Court would be prepared to grant damages to each individual plaintiff as well as the PMTA upon a hearing of evidence pointing to the actual damage suffered by them" (R. 145).

Contrary to the statements contained in petitioners' brief that the damages were computed on the basis of amounts spent by PMTA in carrying on a public relations campaign similar to the campaign conducted by petitioners, PMTA's damages were strictly limited to expenditures made solely for defense against petitioners' conspiracy, and recovery was not allowed for general public relations expenditures (R. 146).

The finding that petitioners would renew their efforts to eliminate respondents' long-haul competition, unless enjoined, which finding is not challenged, justifies injunctive relief. *Bedford Cut Stone Co. v. Journeyman Stone Cutters Ass'n*, 274 U. S. 37, 54; *Georgia v. Penna. R. R.*, 324 U. S. 439.

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issue of computation of damages, stated: ". . . it is defendants' position that PMTA, as a trade association, has no standing to maintain the action or collect damages." (Quoted in Petitioners' present brief at page 50, fn. 36). This is all they can point to in the reams of pleadings, briefs and argument in this case; where every other defense was raised, first by motions to dismiss, thereafter by answer, by argument during the trial, and in the voluminous requests for findings and conclusions which preceded the determination of liability.

CONCLUSION.

The trial court found as a fact that petitioners engaged in a conspiracy with the object of destroying respondents as competitors, and restraining and monopolizing the long-haul freight business in northeastern United States. The Court of Appeals sustained that finding. Petitioners ignore it.

The trial court found further, as facts, that petitioners, in carrying out that conspiracy and purpose, committed many acts above and beyond seeking legislation, including defamatory statements intended to alienate respondents' customers. The Court of Appeals sustained these findings. Nevertheless petitioners persist in arguing that the means used by them were solely legislative.

The trial court found as facts that petitioners misrepresented the source of the material they disseminated, actively concealing their own part in it. Again, the Court of Appeals affirmed. Petitioners' brief reads as if they merely acted anonymously, an entirely different matter. And even then, the privilege of anonymity would not legalize what was otherwise illegal, a combination to restrain and monopolize trade. Nor are the cases apposite here in which this Court shielded individual members of oppressed minority groups voicing legitimate grievances anonymously, where otherwise they would have been intimidated in the exercise of free speech.

The defense that PMTA has no right as an association to recover damages was not timely raised, and has no merit in any event because PMTA has recovered only the damages sustained by it, not the individual truckers. The individual respondents did prove injury, but simply, by stipulation, limited their money damages.

The injunction was carefully drawn, was limited to acts done in combination and with an intent to monopolize or restrain interstate commerce, and expressly disclaims any limitation on efforts to seek legislation for the railroad

industry or without misrepresentation. The court below found as a fact that an injunction was necessary to prevent resumption of petitioners' unlawful activities in violation of the anti-trust laws.

For the foregoing reasons, the judgment of the Court of Appeals and District Court should be affirmed.

Respectfully submitted,

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